No. 365

Supreme Court of the United States

OCTOBER TERM, 1922.

HOUSTON COAL COMPANY, a Corporation
Under the Laws of West Virginia,
Plaintiff in Error,

vs

THE UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief for Plaintiff in Error.

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HOUSTON COAL COMPANY,
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No. 365. *vs.*

UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief for Houston Coal Company, Plaintiff in Error.

Counsel for the Government (Brief, 2) has not stated the case fairly. He says: "The specific question is whether the District Court has jurisdiction to entertain an action against the United States under Section 10 of the Lever Act to recover just compensation for property requisitioned, after the property owner *has accepted* the full amount determined by the President to be just compensation for his property."

If the plaintiff had accepted the full amount and given

voluntary acquittance there would of course be no ca
That plaintiff did *not* accept and acquit the Governme
is the very pith and substance of the plaintiff's petitio

This plaintiff deeply resents the charge of counsel f
the Government in its brief that the plaintiff "wished
play fast and loose with the Government" (Brief, pa
16); or that it is attempting to enlist the sympathy
the court (Brief, page 19) or that it has failed to
serve the injunction of this court, "that men must tu
square corners when they deal with the Government
(Brief, page 19); or that "the situation in which t
plaintiff now finds itself is the result of its attempt
serve its own interests in deliberate disregard of a pla
Act of Congress" (Brief, page 7).

The plaintiff's petition (R., 8) and the amendment
its petition (R., 53) amply disclose that the shoe is e
tirely on the other foot.

This plaintiff was a general dealer, a law-abiding pr
ducer of coal. Plaintiff in the controversy at bar w
not dealing with an individual in private contract. I
product was being taken by the Navy at an enforced pri
of one-half of what it could easily have obtained fro
individuals in the market. Plaintiff was willing to su
render its coal to the Government, even though the wa
had long ago terminated; but certain officers of the Nav
seemed to be determined, by hook or crook, to obtain i
coal at cut-throat prices.

Suits by other coal producers, one of them late
argued in this court (*New River Collieries Co.* v. *T*

United States, No. 316), show the situation in which the coal producers found themselves—a situation not at all creditable to the officers of the Navy. This plaintiff is seeking justice, not sympathy.

Plaintiff also takes this occasion to resent the criticism of the form of its pleadings (Brief, page 10). The criticism is that "plaintiff's petition, as finally perfected by amendment, indicates great reluctance to set forth the facts in a plain, simple manner." Plaintiff's original petition, as we think, sufficiently set forth the cause of action. It was only due to the suggestion of the court below, and in order to conform with its opinion, with which however this plaintiff did not agree, that the amendments were made. The pleader did not feel called upon to plead evidence.

Furthermore, plaintiff desires to deny the imputation of counsel (Brief, page 12) that the plaintiff "imputed bad faith to the President of the United States." We do not need to advise this court that personally, the President of the United States knew nothing about these transactions; they were the work of certain Supply Officers in the Navy Department.

ARGUMENT.

The argument of counsel for the Government, is an attempt to confuse the question of the jurisdiction of the court with the merits of the case, that is to say, the question as to whether or not there was an accord and satisfaction. We contended in our main brief that the plaint-

iff was entitled to a consideration and decision as to all of the facts alleged in the petition by the trial court and the jury. Of course, if plaintiff's petition disclosed questions of law that could be decided by the court in advance of the trial, then this plaintiff was entitled to a decision as to the validity of the cause of action. It goes without saying that if this court desires to pass upon the validity of the petition coincidentally with the jurisdiction of the court below, it will take that course. But the reasoning of counsel as to the jurisdiction of the court should, we think, be kept clear and apart from the reasoning as to the validity of the cause of action in general.

We have contended that Section 10 of the Lever Act was practically a statute providing for proceedings in the process of condemnation under the Government's power of eminent domain, and that the 75 per cent. clause was not by way of qualifying the jurisdiction of the court, but was a collateral provision for the benefit of the person whose property had been commandeered so that he might not be kept out of all of his money pending the settlement of the controversy.

The right of this plaintiff is based upon the Fifth Amendment to the United States Constitution.

We contend that even had Section 10 of the Lever Act never been passed, plaintiff would have had his redress in the Court of Claims. *United States* v. *Lynah*, 188 U. S., 445; *United States* v. *Berdan Fire Arms Co.*, 156 U. S., 552.

This court has held in *United States* v. *Pfitsch*, 256 U. S., 547, *not* that Section 10 of the Lever Act was designed to cut down the right of the citizen to have his redress in such cases, but that it was intended to give him *greater* rights than he had before; that is to say, a right of trial by jury. In other words, the statutory permission to sue the United States could hardly be said, in view of the latter case, to be shorn of any of its amplitude by this new section.

As we have said before, had the case been in the Court of Claims upon the implied contract with the Government to pay for what it had taken under the old statute or under the Tucker Act, the mere receipt of at least that amount which the President's officers admitted to be just compensation, surely would not have disentitled plaintiff to make his case for the full amount of his loss, if greater than the President's price.

The petition of the plaintiff in this case shows that at the time the President's price was received by the plaintiff, the department was repeatedly notified that the price was not satisfactory, and that if received, it was received under protest and with full reservation of plaintiff's rights to recover more.

The Government had full notice of this protest, and notwithstanding its experience with the plaintiff as set forth in the first cause of action, it continued to take the coal and pay the plaintiff the protest price, with full knowledge of the fact that the plaintiff did not intend the receipt of the money to be in full satisfaction.

If the Government chose to pay 100 per cent. of the President's price under these circumstances, should the plaintiff have refused to receive it? It can hardly be believed that the Government would be expected to be guilty of unfair dealings or that Congress intended to impale the citizen whose property had been taken on the horns of a dilemma.

We contend that the 75 per cent. provision was a collateral provision and merely *directory,* authorizing the Government to pay 75 per cent. pending the solution of the difficulty. It is an unwarranted forcing of a construction of the statute, and a construction that would lead to absurdity, to presume that the citizen could not sue the Government if he had taken one penny more than 75 per cent., *no matter what the circumstances. Filben Corp.* v. *United States,* 265 Fed., 354.

Practically the same provision as to payment of the 75 per cent., or in some cases 50 per cent., is found in other statutes giving jurisdiction to the Court of Claims, notably the Acts of March 4, 1917, United States Compiled Statutes, Compact Edition, Section 3115, 1-16C and of June 15, 1917, United States Compiled Statutes, Compact Edition, Section 3115 1-16D.

In a case brought under these provisions, it appears that the Government itself paid the full 100 per cent. of the President's price, and *entered into a stipulation approved by the Attorney General of the United States with the understanding that the claimant should have the right to proceed for the balance he claimed,* in the Court

of Claims, although the Government now questions the jurisdiction of the Court of Claims in that case. *Atlantic Refining Co.* v. *United States,* 34448 U. S. Court of Claims (R., pages 163-164).

So, it will be seen that the Government itself, in the beginning, did not regard the mere payment of 100 per cent. of the President's price as ousting the jurisdiction of the court, in cases of this kind.

Counsel for the Government brushes aside as trivial (Brief, page 13) the suggestion of the plaintiff as to the effect of the payment of 74 per cent. or 76 per cent. to a claimant, or as to the effect of no payment whatever. If the consideration of the element of voluntary accord and satisfaction is omitted at this point, as we think it should be, and relegated to another place in the argument, the suggestion of slight under-payment or slight over-payment, reducing the construction of the Government to an absurdity, is, it seems to us, highly important and not at all trivial. If the jurisdiction of the court is based absolutely upon the receipt by the claimant of 75 per cent. and the Government claims that the District Court has no jurisdiction unless 75 per cent. and only 75 per cent. has been received, then the power of unfair Government officers to exclude a claimant from his day in court will be so great as to lead to an absurdity not to be entertained.

It must not be overlooked that the Act (Section 10) clearly gives to the President the right to pay and "he shall ascertain and pay a just compensation." This

means the full amount. Section 10 then goes on and, after the 75 per cent. clause, provides for the jurisdiction of the court. The phrase used is in general terms and is as follows:

> "And jurisdiction is hereby conferred on the United States District Court to hear and determine all such controversies."

Note the phrase: "All such controversies." We contend that this controversy is *one* of the controversies contemplated in the section.

(a) The Question of Accord and Satisfaction.

The original petition of plaintiff (R., 1) alleges that the defendant "refused to pay a greater sum than $4 a gross ton for coal over the protest of this plaintiff."

The amended petition (R., 8) recites: "plaintiff says that it duly notified the Secretary of the Navy that the compensation so determined by him for the President was not satisfactory to the plaintiff," and also:

> "The said sum was accepted by way of partial payment under protest, however, plaintiff asserting that it accepted said sum, under duress * * * and that in accepting said sum, it, the plaintiff, protested to the Secretary of the Navy and reserved all rights which it might have to collect the full amount of what was just compensation, over and above said sum of $4 per gross

> ton, and over and above said sum of $8,000, and that said sum of $8,000 was paid to plaintiff, as aforesaid, with full knowledge on the part of said officers of said protest."

This plaintiff will not presume to cite authorities to this court that in order to constitute an accord and satisfaction, the receipt of the money *must be intended by both parties* to be an accord and satisfaction. Therefore, no matter what may have been the other circumstances present, a pleading which sets forth that the money was received under the conditions above stated, surely states a case that entitles the plaintiff to introduce evidence and to have that evidence weighed by a court and jury as to whether, in fact, there was an accord and satisfaction.

Counsel for the Government says (page 11):

> "Receiving money tendered as full compensation and giving a receipt in full * * * is an acquittance in bar of any further demand."

The answer to this suggestion is that the plaintiff, as alleged in its petition, *did not give a receipt in full,* but, on the contrary, protested and reserved all its rights, and moreover, the Government continued to pay him 100 per cent. of the President's price, with full knowledge of his protest.

American Smelting Co. v. *U. S.*, 259 U. S., 75, 78.

(b) The Question of Duress.

It is very easy for counsel for the Government, after all these years, and after the facts have perhaps become dimmed in the minds of the Navy officers, to make sarcastic allusions to the plaintiff's conduct: that it was "unwilling to comply with the terms of the Act and in an endeavor to circumvent the Act and at the same time make out a cause of action against the United States, etc." (Brief, page 10). The fact is, as alleged in the petition, all the troubles plaintiff had with the government were due entirely to the truculence and outrageous acts of certain officers of the Navy who were determined to obtain $4 coal for the Navy when everybody else in the United States, including the other branches of the Government, had to pay $8 a ton for the same coal.

Is it conceivable that the Navy officers, by their own actions, dealing with a citizen who was powerless under their hands can, by such methods, and after forcing one whose property has been taken also by force, foreclose him or it from a remedy by claiming that the statute itself made the receipt of 100 per cent. of the President's price an accord and satisfaction, without any possibility of inquiry by the District Court, or by any other tribunal, as to the circumstances under which the receipt of the money was had?

We do not think that Congress could have intended the mere receipt of the money no matter how induced, to be

a statutory accord and satisfaction, closed against further inquiry. That would have been to deny due process of law.

The Navy officers in the first place could, and did dangle before the bewildered citizen the proposition of "$4 and quit or $3 and sue."

The war was over, although perhaps not technically so. The President had lifted fixed prices on coal. The Navy was willing to pay only $4 and the open market afforded $8 to the operator. The Government owed the claimant large sums of money (R., 54). The Navy officers informed the plaintiff that if the election was not made, these sums would be withheld and that the mines of the plaintiff would be taken. It is submitted that an election, secured by the Navy under these circumstances under the cases cited in the original brief, is not to be taken against the plaintiff.

Counsel for the Government, probably unwittingly, says:

> "It is not alleged that the plaintiff was required to elect to take the President's award or that in making its choice it was influenced by threats one way or the other." (Brief, page 15.)

Counsel has ignored the second paragraph of the amendment to the amended petition (R., 54). The first paragraph of the amendment sets forth the facts of the duress in connection with the election itself. The second paragraph alleges *that the same threats* were made

"touching the acceptance by said plaintiff of said price so fixed by the President as just compensation."

The facts as admitted by the motion discloses the manifest system of the Navy officers. They proposed to commandeer coal instead of purchasing at the market value in the open market, and they were going to purchase at, or near the old price fixed by the President, notwithstanding the fact that the market price had since doubled, and their theory evidently was that the whole controversy could be nicely closed by engineering the coal operators into accepting their prices and thereby dispossessing the coal operator of any further right to sue. Such was doubtless their construction of Section 10 of the Lever Act, and such is the construction of counsel for the Government in the case at bar.

CONCLUSION.

It is submitted that all of these questions of fact are important and that the plaintiff has the right to litigate them and that it has a right to recover before a jury if it can sustain its facts and at least "have a chance for its white alley."

Respectfully submitted,

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Attorneys for Plaintiff in Error.

Addendum.

In a lawsuit brought against the United States by a coal company whose coal had been taken, but who had been paid but 75 per cent. of the President's price (the case of *Blake Coal Co.* v. *United States,* No. 2918 in the Southern District of Ohio, Western Division, tried before Judge Peck, who also decided the case at bar) the Government was attempting to show market value by citing the price paid to the Houston Coal Company and others, that is $4 per gross ton, under the circumstances set forth in plaintiff's petition. The following colloquy occurred between counsel for the government and the court:

Mr. Roudebush: They are voluntary, Your Honor.

The Court: Is it quite voluntary if a man has to accept what is offered him or bring a lawsuit?

Mr. Seasongood: And lose interest—we can't recover interest and attorney fees.

Mr. Roudebush: And attorney fees—we heard that before.

The Court: Do you regard that as voluntary?

Mr. Roudebush: I think so, Your Honor.

The Court: I am inclined to think, and in fact I am prepared to rule that that is not a voluntary transaction within the meaning of that phrase as used in determining market value. We exclude, for instance, a sher-

iff's sale, in an appropriation case, in getting at market value we exclude a sheriff's sale, although there may be competition and everyone has an opportunity to bid, yet we exclude those as forced sales. We exclude purchases made under circumstances of compulsion, as, for instance, we exclude purchases of right of way by a railroad where it is necessary either to purchase it or condemn it. *For the same reason you would exclude an acquiescence in a price fixed by the Navy for coal which it has requisitioned when it states to the supplier "You must either take this price or accept seventy-five per cent. of it and sue us for the balance."* If the account were small, the cost of a lawsuit might be a very substantial element in determining whether it was worth while or not. And therefore, it seems to me quite clear that that is not within the realm of voluntary transactions, as we understand them, in fixing market value. I think the criticism is well taken.